

NANCY A. ELLIFRITS
Claimant

CHANUTE HEALTHCARE CENTER
Respondent

PREMIER GROUP INSURANCE COMPANY
Insurance Carrier

1. Does the statutory authority exist within the Kansas Workers Compensation Act which allows the ALJ to compel respondent to pay claimant's attorney fees, pre-award?
2. Was claimant's attorney lien enforceable as a lien?
3. Should claimant's attorney be required to enforce his attorney fee agreement with his client and satisfy his fees from the ongoing TTD payments being made to claimant?
4. Was the amount of the attorney fee lien proven?
5. Were respondent's due process rights violated?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board concludes the January 29, 2007 Order should be reversed.

Claimant alleges accidental injury arising out of and in the course of her employment with respondent on March 9, 2006, when she injured her left shoulder lifting a resident at respondent's facility. Claimant's E-1 Application For Hearing was filed with the Workers Compensation Division (Division) in August 2006, at which time claimant's contract with her attorney was also filed with the Workers Compensation Director (Director).

A preliminary hearing was held on October 18, 2006, from which claimant was awarded TTD benefits. The TTD was paid by respondent, although the exact timing of those payments, to whom those payments were made, and the total amount paid were not verified in this record.

Claimant's attorney filed a Motion To Direct, which was heard on January 24, 2007, and resulted in the January 29, 2007 Order which is the basis for this appeal. At that motion hearing, claimant's attorney alleged that respondent had failed to protect claimant's attorney's lien, as is required by K.S.A. 44-536(b). Claimant's attorney requested payment from respondent in the amount of \$994.36, or 25 percent of the total amount of TTD allegedly paid claimant. However, claimant was not produced and did not testify at that hearing, and the status of the contract between claimant and her attorney in regard to that lien was not verified in this record. Claimant's attorney speculated at the hearing as to how much TTD was paid, but provided no evidence to verify same.

The Kansas Workers Compensation Act is complete within itself.¹ K.S.A. 44-536 allows for the award of attorney fees in certain situations. However, the statute requires the Director approve the contract and the fees requested under that contract. Nothing in this record verifies the reasonableness of the amount of fees being requested beyond claimant's attorney's speculation as to the amounts that may have been paid. Claimant was not at the hearing to testify as to the amount, if any, of TTD paid. Additionally, no evidence was provided as to whether claimant paid any portion of the supposedly paid TTD to her attorney. Without claimant's testimony, it is unclear from this record as to the exact status of claimant's attorney's lien.

Additionally, those omissions notwithstanding, by statute, the Director's approval of the attorney fee contract comes at the time of the final award, or at the time of the settlement of the litigation. There is nothing in K.S.A. 44-536 which allows for the approval of attorney fees or the payment of attorney fees pre-award.

¹ *Dunn v. Kuhlman Diecasting Co.*, 203 Kan. 670, 455 P.2d 536 (1969).

The Board finds the ALJ exceeded his jurisdiction² in ordering pre-award attorney fees in this matter, and that Order must, therefore, be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Thomas Klein dated January 29, 2007, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of April, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

² K.S.A. 2005 Supp. 44-551.